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IN THE

Supreme Court of the United States

October Term, 1962

No. 898

THE STATE OF NEW YORK,
Petitioner,

v.

FRANCIS HENRY BLOETH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Attorney General of the State of New York and the District Attorney of Suffolk County, New York, on behalf of the State of New York, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit rendered in the above case on January 25, 1963.

Opinions Below

The opinions of the District Court for the Southern District of New York are reported at 204 F. Supp. 263. The majority and dissenting opinions of the Court of Appeals for the Second Circuit are unreported to date and are set forth in full in the Appendix hereto annexed.

Jurisdiction

The decision of the Court of Appeals for the Second Circuit was rendered on January 25, 1963. An order staying the issuance of the mandate pending timely application to this Court for a writ of certiorari was granted by the Court of Appeals for the Second Circuit on February 18, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

The respondent was convicted of Murder in the First Degree on May 14, 1960, in the County Court for Suffolk County, State of New York, after a jury trial and he was sentenced to be executed according to law (3978, 3999).* Prior to the commencement of the trial, counsel for the respondent made an application for a change of venue to the Appellate Division of the Supreme Court of the State of New York, Second Department, claiming that the adverse newspaper publicity concerning the murders allegedly committed by the respondent, his confession, and his prior criminal career had so prejudiced the residents of Suffolk County that a fair and impartial jury could not be obtained in that county (334-759). The Appellate Division of the Supreme Court of the State of New York denied the application (328-332).

The judgment of conviction was unanimously affirmed by the Court of Appeals of the State of New York on March 2, 1961, 9 N. Y. 2d 211. On March 30, 1961, leave to reargue was denied by the New York Court of Appeals but the remittitur was amended to provide that certain

* References are to folios of the Record on Appeal to the New York Court of Appeals.

questions under the Fourteenth Amendment to the Constitution of the United States were presented to and passed upon by that Court, 9 N. Y. 2d 823. A petition for a writ of certiorari directed to the Court of Appeals of the State of New York was denied by this Court on October 9, 1961, Mr. Justice Douglas dissenting, 368 U. S. 868.

Subsequently the respondent petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus. On October 30, 1961, the District Court granted the respondent permission to proceed in forma pauperis and on November 20, 1961, appointed Anthony F. Marra, Esq., the attorney of record for the New York Legal Aid Society, as counsel to represent him. At the request of Anthony F. Marra, the United States District Court for the Southern District of New York allowed respondent to withdraw without prejudice his petition for a writ of habeas corpus so that leave to reargue before the New York Court of Appeals might be requested.

On February 22, 1962, the New York Court of Appeals denied without opinion the application for reargument and set the week of March 26, 1962, for execution of the death sentence. 11 N. Y. 2d 798. On March 19, 1962, Mr. Justice Harlan of this Court denied an application by the respondent for a stay of execution pending the filing and disposition of a second petition for certiorari to review the order of the New York Court of Appeals denying reargument. 7 L. Ed. 2d 780, 82 S. Ct. 661.

The respondent then renewed his application for a writ of habeas corpus in the United States District Court for the Southern District of New York and on March 26, 1962, obtained a stay of execution from District Judge John M. Cashin pending a disposition of the application. This

initial application questioned whether the confession admitted in evidence against the respondent was voluntary and claimed that it was procured in violation of his right to be represented by competent counsel devoted solely to his interests. On April 3, 1962, this application was denied by District Judge Cashin.

Respondent then moved for reargument in the United States District Court for the Southern District of New York and sought leave to amend his petition charging that he was denied the right to a fair trial in violation of his rights under the Fourteenth Amendment because the Appellate Division of the Supreme Court for the State of New York had denied his application for a change of venue basing this claim upon certain articles concerning the case which appeared in various newspapers before the trial. District Judge Cashin granted reargument and the amendment requested but on May 9, 1962, denied the petition after considering the new question raised.

Leave to appeal to the United States Court of Appeals for the Second Circuit was granted by that Court on May 22, 1962, Chief Judge J. Edward Lumbard dissenting. On December 5, 1962, the panel which heard the original arguments, Chief Judge Lumbard, Judge Marshall and Judge Smith, recommended the case for in banc consideration recognizing the importance of this case "*as a guide for the District Courts in the discharge of their high responsibilities in the habeas corpus jurisdiction and particularly in the application of the principles recently set down in Irwin* v. *Dowd, 1961, 366 U. S. 717,* * * *.*"

A majority of the Judges of the United States Court of Appeals for the Second Circuit reversed the orders of the District Court appealed from and remanded for the issuance of a writ of habeas corpus holding that on the

record the extent of the publicity was such that the jury drawn did not meet the standards of impartiality required by the Fourteenth Amendment although in view of the time which has now elapsed a change of venue may not be necessary if the jury chosen does meet the necessary standard of impartiality.

The questions presented are:

1. Whether upon the record the nature and extent of the pre-trial publicity caused such a build-up of prejudice against the respondent that the jury drawn in this case did not meet the standards of impartiality required by the Fourteenth Amendment?

2. Whether the respondent sustained the burden of establishing that this jury was prejudiced as a demonstrable reality in view of

a) the passage of eight months between the publicity and the trial,

b) the failure of the defense to exhaust all peremptory challenges and the specific acceptability of each juror to defense counsel,

c) the responses of the talesman during the voir dire examination which indicated that only four of the twelve jurors who rendered the verdict had some opinion as to guilt before the trial,

d) the fact that this opinion as to guilt concerned whether the respondent did in fact kill his victim and not the real issue presented to them as to whether the respondent was sane at the time, and finally

e) the fact that the publicity complained of actually bolstered the defense claim of insanity since it emphasized

the brutality of the acts committed, their senselessness, the lawless pattern of the respondent's behavior and was supported by opinions from his family that he was mentally sick?

3. Whether publicity alone can be complained of as depriving the defendant in a criminal proceeding of his constitutional right to a fair trial when that publicity in great measure is supplied the press by the defendant, his lawyer, his wife and his parents in a manner calculated to raise a question as to the defendant's sanity?

Statement

To understand fully the circumstances surrounding this case one must begin with an incident which occurred on Friday evening, July 31, 1959. On that evening, at about 10:00 o'clock a small 53-year-old delicatessen owner named Hans Hachman was shot in the heart and killed with a .32 caliber bullet while alone in his store in Islip, New York (348, 389). His pockets were turned inside out and it was believed that the killer had robbed him of about one hundred dollars, the usual amount this small businessman kept on his person. There were no eyewitnesses to the murder or other evidence which might lead to the identification of the assailant, thus rendering the investigation by the local Town of Islip police most difficult (389).

Five days later on August 5, 1959, at 4 o'clock in the morning Lawrence L. Kircher, a counterman in a small diner in the neighboring community of Smithtown, was shot in the back of the neck and killed with a .32 caliber slug and robbed of about one hundred dollars in cash. There were no customers in the diner at the time and no eyewitnesses to this second murder in a business establishment within five days (349, 401).

In each case the motive appeared to be robbery. Since neither establishment showed signs of a scuffle, it was considered possible that both victims were shot first to avoid identification and then robbed (401).

Three days later a third murder following the same pattern occurred this time in the community of Westhampton in eastern Suffolk County. Early on the morning of Saturday, August 8, 1959, sometime between midnight and 1 A. M., Mrs. Irene Currier was shot in the head and killed with a .32 caliber bullet in Bailey's Restaurant (838, 840, 858, 862, 956, 1238, 2204, 4100). Mrs. Currier, a woman of about 50 years of age, operated this small eating place with her husband (890, 948). Prior to the killing the murderer had held up his victim at gun point and had removed from the cash register a sum of money somewhat in excess of one hundred dollars (4093, 4096). He then ordered the woman into the back room where he tied her hands and feet together. Taking a towel he tried to strangle her to save his last bullet but she broke her hand loose so he cocked his gun and shot her because "she knew what I looked like" (4097, 4099, 4112).

It is at this point after three brutal murders in quick succession that we find the police getting their first real clue. Robert Walsh, a youth known to the police with a long record of convictions for assault, came forward and told the police that he had sold the respondent a .32 caliber automatic on August 7th only a few hours before the Currier murder for $25 (473, 479, 1146, 1158, 1161). Apparently Walsh had also told the police that the respondent had admitted to him that he had committed the earlier Hachman and Kircher murders with another .32 caliber revolver which Walsh had sold him (479).

With this information at hand, the Islip Town police on Monday, August 10, 1959, at about 8:00 P. M. picked up

the respondent for questioning (1310, 1313). He was questioned through the night by detectives of the Islip Town Police, by the Chief Investigator from the District Attorney's office and later by the Chief of the Smithtown Town Police (1328, 1334, 1337, 1438, 1439, 1556, 1727).

The next morning, August 11, 1959, respondent's sister, who worked as a file clerk in the law office of Sidney Siben, Esq., of Bay Shore, New York, spoke of the respondent's arrest to her employers (1987). Evidently the respondent's wife also called the office of Sidney Siben that morning (1989). As a result of these inquiries John B. Clarke, Esq., who was then employed in Mr. Siben's office, went to where the respondent was being held and conferred with him (1989, 2032). Walter Siben, Esq., a member of this law firm, called the Chief Investigator in the District Attorney's office on this morning of August 11th and informed him that the Siben office would represent the respondent (1777). On Wednesday morning at 10:00 A. M. the respondent was arraigned before a magistrate in the Court of Special Sessions of the Town of Islip and charged with Robbery in the First Degree for an incident unrelated to the three murders. At the request of Sidney Siben, Esq., the respondent was thereafter kept at the Islip jail for further questioning rather than being taken to the County Jail at Riverhead some forty miles to the east (Peo. Ex. 25) (2009-2010).

During the next several days the respondent was visited on a number of occasions by his mother, his wife, and his lawyer (1730-1734, 1775, 1776, 2048). On Thursday, August 13th, Mr. Siben spent most of the day with him. On that evening after supper this lawyer and the respondent's wife, Jane, visited the jail and were alone with the respondent until almost midnight (1997, 2011, 2012).

This final interview with Mr. Siben and Jane Bloeth provides the key to why a full confession was given to the District Attorney at 2:15 A. M. that night. According to Jane Bloeth she was in the room alone with her husband when he finally agreed to tell the truth (509).

Jane Bloeth was deeply in love with the respondent, but she believed he was mentally disturbed. Although untrained in the field of psychiatry both she and Bloeth had worked for a period of time as attendants at a large State mental hospital at Central Islip, New York (611, 2809, 2885). She explained the way she succeeded in getting her husband to confess when the pleas of the police had failed in a statement to the reporters from Newsday:

> "'When I first came in he kissed me,' she said. 'At first he kept denying that he was involved. I don't know why, but I was getting suspicious. I got suspicious when Bobby (ex-convict Robert Walsh) said he's sold the guns. And then when Frankie told Mr. Siben this afternoon that he knew where one of the guns was but would never tell.'
>
> "'I begged him, Frankie, give it up. Tell them where the gun is * * * where both guns are * * * Frank, if the guns weren't used in the holdups you've got nothing to fear. * * * For the sake of our child—and for me—do what's right. Tell them.' I got on my knees and I pleaded. I was on my knees for 10 or 15 minutes. I begged him to tell Mr. Siben the truth. I said, 'You're sick, Frankie, you need help.'"
>
> "'I'm okay, there's nothing wrong with me,' Bloeth was quoted as saying. Then, while his wife was still on her knees, he decided to call it quits. 'OK,' he said, 'Get Siben in here and I'll talk.' Siben who had gone out of the room to give Mrs. Bloeth some moments alone with her killer husband, was called back in and started taking the notes for the confession." (509).

Mr. Siben was quoted in "Newsday" as giving the following explanation of the confession:

> "In explaining Bloeth's confession, which came early yesterday after his wife, Jane, 25, had wept and pleaded on her knees for 15 minutes, Siben said he had felt that it was his 'duty to get him to tell the truth because I represent his family and they were afraid to have him freed.' Siben said if Bloeth had not confessed he could have been tried on the mounting evidence against him. 'Without talking about his own crimes, no one would have known he was insane, and he would have had no defense at all'." (527).

Mr. Siben claimed on the witness stand that he advised his client that he was under no obligation to make a statement, and that a failure to do so could not be used in evidence against him (2053). He summed up the advice he gave in these words:

> "A. Yes, I think I told you *with the advice of the wife and the defendant*, after explaining to them, I told you this, how serious this was, that he was prepared to give you a statement as to what had transpired, and I told you I felt after having heard the story from him for the past hour or so there was no question in my mind that this man was not responsible. I did tell you that, sir." (2022) (Emphasis added.)

In the statement of confession the respondent made a clean breast of the events surrounding the three murders. In connection with the murder for which he was tried, he not only told of his purchase of the gun from Mr. Walsh, but he also gave a graphic description of the robbery of the diner and his assault and eventual murder of Mrs. Currier (Peo. Ex. 27) (4080, 4093-4100). The respondent's statement also disclosed that he threw the gun into Lake Ronkonkoma, a large lake in central Suffolk (4103). After he gave his statement to the police on August 14th, he went

with them to Lake Ronkonkoma and pointed to the spot where he threw the gun (Peo. Ex. 15, 17) (1580, 1581). The gun was found by the police at the point indicated by the respondent (1584) and a ballistics expert testified that the bullet found in the diner was fired from this gun found in the lake (1833).

While news of the three murders and the apprehension of the respondent with his subsequent confession received widespread publicity in the local press from August 1 to August 19, 1959, very little appeared thereafter. (Record on Appeal to New York Court of Appeals, pp. 130-237). The only article after September 1st which is included in the record is a short article in the Long Island Daily Press on October 7, 1959, which reported that the respondent had obtained a new lawyer (671). It was not until April 18, 1960, that the selection of the jury began (777). This was some eight months after the publicity appeared.

Most significant is the fact that most of the news stories after the confession were engendered by the respondent, his lawyer, his wife and his family to bolster the defense claim of insanity (461, 473, 491, 497, 503, 509, 515, 521, 527, 533, 539, 545, 563, 569, 575, 581, 587, 593, 599, 635, 641, 647, 653, 659, 677, 695).

Typical was the statement by attorney Siben to Newsday immediately after the confession was made:

> "His attorney, Sidney Siben of Bay Shore, said that he would move immediately to have Bloeth committed for psychiatric examination. 'He's a sick man,' Siben said. 'He needs to be treated. This man is mentally deranged. He felt no remorse whatsoever at any of these killings. * * * He didn't know what he was doing. He doesn't comprehend the difference between right and wrong. * * * His family is very much relieved that he won't be in a position to harm anyone ever again.' " (503).

In the August 18th edition of "Newsday" Siben is again quoted on this subject:

> "Siben, who is seeking to have Bloeth declared insane, described his client as being 'as mad as a hatter and I intend to prove it with the help of a psychiatrist who is investigating Bloeth's background. No man could gleefully boast about such terrible crimes without being insane.' " (587).

Jane Bloeth added to this picture of her husband as a deranged killer by giving newsmen a detailed account of her husband's philosophy of life. In the Long Island Daily Press she was quoted as saying:

> " 'From the things he said to me about death * * * the way he talked about it so much * * * his constant fights and then the trouble with the police again and again * * * I knew he was mentally sick.
>
> " 'It was so different from the way he had been. He can be such a good man when he wants to be. That's why I love him.
>
> " 'I told him he needed help, a doctor's help.
>
> " 'Frank you must come with me to the hospital and go under hypnosis,' I said, 'so they'll find out what's really wrong with you. I'll go under hypnosis too, so you can read what I say under hypnosis. Then you won't mind my reading what you say and find out what's bothering you so much.'
>
> " 'He accused me of thinking he was crazy. He said a crazy man couldn't have a wife and baby. He said only weak and sick people are crazy.
>
> "I said, 'Frank you don't know how weak and sick you are.' " (635).

Another Article in Newsday followed the same pattern:

> "The young wife, vowing to stand beside her husband, said: 'Oh, dear God, I hope they forgive me and my baby. We didn't know. We couldn't

believe it. He's sick. My God, he's sick. * * * But I'll protect him to the end. I married the man for better or for worse and I'll stay with him no matter what. I still love him. More than ever now. He's so alone. He still needs me more than ever.'

"She then described Bloeth as a sort of Jekyll and Hyde, who turned savage when he had liquor in him but never manhandled her. 'He always treated me and the baby (8-month-old Karen) like saints,' Mrs. Bloeth said. 'During the day he was so nice and so calm, but at night, when he drank, he seemed to change. He was told not to drink whisky. He always went crazy when he had something to drink. He wanted to destroy things * * * to fight. * * * But not with me. He never even raised his voice to me. I used to ask him, "Why do you want to fight?" And then he'd sort of black out and say crazy kinds of things, and then minutes later he'd pick up just like he hadn't said anything.'

"She and Siben, who said he would push for an immediate sanity examination, told how the killer always had plenty of money with him when he started his holdup slayings. He was quoted by Siben as saying that he would have 'killed' everyone in the place' if he had bullets with him when he pulled his 'Russian roulette' holdup in a tavern about a week prior to the first murder. He also was quoted as saying he would have continued his mad killings, if he had not used up his bullets on the three victims who were gunned down within eight days." (497, 509).

Both the wife and Siben were quoted in the August 18th Daily Press:

"'Why didn't you tell me these things?' She asked. 'Why didn't you go to a psychiatrist before all these terrible things happened?'

"Siben said a psychiatrist checking into Bloeth's background has found traces of insanity in Bloeth's family." (659).

A summation of this developing defense strategy appeared on August 15th in the Long Island Daily Press:

> "While Siben laid the groundwork for an insanity plea yesterday, it was not known whether he would try to prove 'continuous insanity' or just temporary insanity at the time of the murders Bloeth has confessed.
>
> "His parents say Bloeth's derangement dates from the age of 12, when they say he fell from a tree and landed on his head. He suffered periodic black-outs ever since, they told reporters.
>
> "From his parents, his wife, and from Siben, a portrait was etched of Bloeth as a man with savage killer tendencies, completely devoid of human feelings—for all except his immediate family.
>
> "'If you gave this man the electric chair, it wouldn't mean a thing to him,' said Siben. 'He doesn't care about his own life either.'
>
> "Siben said Bloeth 'belongs in confinement under psychiatric treatment' and he would seek to have him committed for life to the Matteawan State Hospital for the Criminally Insane.
>
> "Even as his family and attorney sought to prepare his insanity defense, the surly, steely-eyed 27-year-old construction worker played the role of psychopath with apparent relish.
>
> "At his arraignment yesterday before Islip Town Justice of the Peace Alfred E. Freeman, the defendant turned to reporters and laughed:
>
> "'I wonder what fatso would have done if I had pulled a gun on him.'" (641).

From these excerpts from stories supplied to the press by the defense, the strategy of Mr. Siben becomes clear. He was convinced that the authorities had enough evidence to convict the respondent without a confession. He believed no jury would accept the respondent's denials, but

that they might agree that a man with his past record of brutality was mentally deranged. Providing the press with background material in support of this defense, became a part of the strategy.

Although the respondent decided to dismiss Mr. Siben from the case, his trial counsel continued the same strategy. No attempt was made at the trial to prove that the respondent did not kill Mrs. Currier. The sole defense was one of insanity as the opening and closing remarks of defense counsel so clearly indicate (815-825, 3639-3694).

Reasons for Granting Writ

The decision below should be reviewed and reversed because it erroneously applies the principles set down by this Court in *Irvin* v. *Dowd*, 366 U. S. 717 (1961) concerning jury impartiality where prejudicial news reporting is alleged.

An *in banc* decision likely to affect so many other cases should not be permitted to remain as a precedent unless the principles enunciated are sound and workable. *Walters* v. *Moore-McCormack Lines, Inc.*, New York Law Journal, February 14, 1963, p. 1, col. 1 (2nd Cir. January 14, 1963).

In *Irvin* v. *Dowd, supra*, the murder conviction by a jury in Gibson County, Indiana, a rural county adjoining the City of Evansville, was reversed and remanded because prejudicial news reporting for six or seven months right up to the time of the trial was so deep and bitter that it it was not possible to select an impartial jury. Almost 90% of the prospective jurors entertained some opinion as to the defendant's guilt. 8 of the 12 who finally entered the jury box thought him guilty. All peremptory challenges were exhausted by the defense in an endeavor to remove

these prejudicial jurors from the panel and attempts to remove others for cause on this ground proved unsuccessful. A guide for future application in cases of this nature was expressed by the majority in these words:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.* (Cases cited)". (Emphasis supplied)

This rule recognized that in our society where crime and corruption are exploited in the press under the protection of the First Amendment jurors in metropolitan areas are bound to come in contact with news accounts which reflect upon the crime committed by a defendant but that such contact alone need not disqualify a juror from serving. See opinion of Judge Fuld in *People* v. *Genovese*, 10 N. Y. 2d 478, 481-482, 225 N. Y. S. 2d 26, 28, 29 (1962). Indeed, there are some who argue that no one has yet come forward with concrete proof that prejudicial news articles do actually prevent a jury panel from arriving at the truth, and thus justice. Ronald Goldfarb, Public Information, Criminal Trials and The Cause Celebre, 36 N. Y. U. Law Rev. 810, 831, 835 (1961).

We submit that the rspondent had the burden of proving actual not speculative prejudice. In *Stroble* v. *Cal-*

ifornia, 343 U. S. 181 (1952) the defendant sought a reversal on the ground that the jurors were prejudiced against him because of the newspaper articles published about the case. He was convicted of murdering a six year old girl. A full confession had been given to the prosecutor and the prosecutor released it to the press. On a writ of *certiorari* your Court affirmed the conviction stating at page 195:

> "Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprive him of due process. That we cannot do, at least where as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper accounts was made voluntarily and was introduced into evidence at the trial itself."

Your Court concluded by quoting from *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 (1942):

> "'If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'"

Respondent in support of his application to the United States District Court placed reliance solely upon the rec-

ord in the state court. No affidavits or new material were submitted to overcome this burden of proof.

See also *Beck* v. *Washington*, 369 U. S. 541 (1962); *Geagan* v. *Gavan*, 292 F. 2d 244 (1st Cir. 1961); *Ferrari* v. *United States*, 244 F. 2d 132, 138 (9th Cir.), cert denied, 355 U. S. 873 (1957); *Smith* v. *United States*, 236 F. 2d 260, 269, 270 (8th Cir.), cert. denied, 352 U. S. 909 (1956); *United States* v. *Carruthers*, 152 F. 2d 512, 519 (7th Cir. 1945), cert. denied, 327 U. S. 787 (1946).

We submit that a decision of the Appellate Division of the Supreme Court of New York in refusing a change of venue application which has been affirmed by the Court of Appeals of New York, 9 N. Y. 2d 211, should not be overturned unless it can be determined that a gross error was committed. *Beck* v. *Washington, supra; Stroble* v. *California, supra; Holt* v. *United States*, 218 U. S. 245, 248 (1910); *Reynolds* v. *United States*, 98 U. S. 145, 156 (1878); *Dillon* v. *United States*, 218 F. 2d 97, 103 (8th Cir. 1955); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 78 Harv. L. Rev. 441, 528 (1963). No such manifest error is disclosed by this record.

The majority below infer that the publicity in this case was so widespread and prejudicial that no impartial jury could be chosen in Suffolk County with its population of 600,000 notwithstanding the passage of eight months time and the protection of a detailed *voir dire* examination. Inconsistently they conclude that sufficient time has now elapsed to allow a fair trial in Suffolk. To support their conclusion that the Suffolk jury which tried this case could not be impartial, they make note of the very limited self-serving public opinion survey which was attached to the application for a change of venue and which contained no criterion to indicate whether the polltaker was qualified

to engage in that profession nor what factors were considered in determining the accuracy of the sample questioned. On the weight to be given a public opinion survey on a request for a change of venue see *Irvin* v. *State*, 66 So. 2d 288 (Fla. 1953), cert. denied, 346 U. S. 927, rehearing denied, 347 U. S. 914 (1954). See Note, 76 A. L. R. 2d 619 (1961). It seems inconceivable that a court would give credence to a poll of this nature and yet give no weight to the answers of the jurors during the detailed *voir dire* examination.

We believe the passage of eight months from the date of the last article alleged to be prejudicial to time of the trial most significant. In the Beck case the prejudicial articles had appeared nine and one-half months before the trial. The Third Circuit in an apparent disagreement with the majority below as to the importance of the passage of time upon retention of prejudice denied a *habeas corpus* petition on the *Irvin* v. *Dowd* theory in *Torrance* v. *Salzinger*, 297 F. 2d 902, 903 (3rd Cir.), cert. denied, 369 U. S. 887 (1962) stating:

> "It does not appear that derogatory or hostile and inflammatory statements about the petitioner were circulated during or shortly before the trial in or near the community where the jurors lived. Yet, it is only on a convincing showing that the accused has been tried while the public mind was poisoned against him by current and pervasive derogatory publicity that convictions have been set aside on such claims as the petitioner asserts here."

In *Commonwealth* v. *Geagan*, 339 Mass. 487, 159 N. E. 2d 870, cert. denied, 361 U. S. 895 (1959) involving the famous Brinks' robbery, some four to five months had elapsed.

Also significant is the fact that the twelve jurors who tried this case were not challenged for cause by the re-

spondent and were all pronounced satisfactory by the respondent's attorney (A-30, B-36, C-29, D-25, E-44, F-21, G-20, H-21, I-27, J-26, L-26, 27, O-35) * * *. No juror challenged for cause was seated. He was either dismissed for cause or with the consent of the prosecutor. Contrast this with *Irvin* v. *Dowd* where jurors were seated although challenged for cause. In *Beck* v. *Washington, supra,* this fact was considered important:

> "The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt."

In New York State in a capital case of this nature each side has thirty peremptory challenges plus three additional for each alternate juror. Code of Criminal Procedure, Section 373, subdivision 1. The respondent had utilized only twenty of these peremptory challenges when the twelfth juror was selected. Likewise, except with respect to the third alternate juror, he had not exhausted his peremptory challenges during the selection of the alternates.

Actually who was in a better position to evaluate each juror's state of mind than trial counsel who lived in the community, knew what articles were published and their possible effect, knew the theory of the defense and met each prospect face to face?

A further examination of the voir dire transcript in this case does not disclose the deep-seated prejudice which was clearly present in *Irvin* v. *Dowd, supra,* where 268

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* References are to pages of the transcribed examination of prospective jurors.

** Alternate juror Lomonosoff was substituted in place of Theodore Dowd before the trial began (777).

prospects out of 430 were challenged for cause as having fixed opinions as to guilt.

In the instant case a total of 95 jurors were questioned in the effort to select a panel of 12 plus 4 alternates. 35 of these were excused by consent without any questions having been asked of them concerning newspaper publicity or what opinions concerning the respondent they may have harbored. Six more were removed for cause or by the exercise of a peremptory challenge without any questions concerning publicity or opinion having been asked.

That leaves 54 who were asked whether they had read about the case in the newspapers. 51 said they had. Three had not. One of those who had not read about the case was Obert who was selected as Juror No. 3. He said that he was out west during August when the papers carried the accounts alleged to be prejudicial (C-4, 5, 17).* Of course he had no opinion concerning the guilt or innocence of the respondent (C-6).* Knaggs and Griffin were the other two prospective jurors who had not read about the case (DD-42, EE-27).*

Of the 51 who had read about the case some read very little, others day by day as it appeared. Nine of the prospects who read about the case were asked if they had read of the confession. Five said they had not (AA-66, A-24, B-27, D-20, CC-132).* Four said they had (AA-121, CC-23, CC-110, CC-170).* These answers give some indication of the effect passage of time has on obscuring vital facts.

Of these same 51 who had read about the case, 34 had some opinion as to guilt, 13 had no opinion as to guilt and four were not asked. Of these 34 who had some opinion as to guilt only seven had a deep-seated opinion which

could be called prejudicial and they were all excused from service with the loss of but one peremptory challenge:

Name	*Voir dire reference*	*Excused*
Kemp	AA– 84, 103, 118	Respondent peremptory
Martens	AA–136, 151	Respondent for cause
Meyer	CC– 83	By consent
Seabury	DD– 27, 28	Respondent for cause
Ast	DD– 49	Respondent for cause
Duffield	DD–173	By consent
Furey	EE– 38	Respondent for cause

Going back to the 54 prospective jurors who were asked if they had read about the case, 34 or 63% had some opinion as to guilt, 14 or 26% had no opinion as to guilt and 6 or 11% were not asked. Contrast the situation in *Irvin* v. *Dowd, supra,* where almost 90% entertained some opinion as to guilt.

The respondent was successful in getting 8 of the 14 who had no opinion as to guilt on the panel and another as one of the alternates. Those with no opinion as to guilt were:

Name	*Voir dire reference*
Obert	C–6
Usher	D–5
Uhl	F–5
Larsen	G–5
King	H–4
Rockwell	I–5, 21
Adams	J–5
Lomonosoff	O–9, 28
Alternate	
Parizman	N–4

In *Irvin* v. *Dowd*, 8 of the 12 jurors thought the defendant was guilty.

Coming to the four jurors who were selected who had some opinion as to guilt, that opinion was very slight and all four expressed the view that they could render an impartial verdict:

Name	*Comment and voir dire reference*
Bassarear	"Q. You still have that opinion? A. Yes. Q. Whatever the opinion is, do you think it could be changed if you were to listen to testimony from the lips of witnesses. A. Yes, I do, because I don't believe you can put too much faith in the way the newspapers present—" (A-7) • • • "Q. And you further stated that it was not a strong opinion because you felt what was printed in the papers need not necessarily be either accurate or true, is that correct? A. That's correct." (A-25)
Bellizzi	"Q. Now, as a result of what you heard or read about the Westhampton case, did you form any prejudice against the defendant? A. No." (B-16, 17)
Schumann	"Q. Well, now as a result of what you did read or hear or see or talk about, did you form or express any opinion or impression about the guilt or innocence of the defendant? A. I did at the time, yes. Q. Do you still have that opinion, whatever it is? A. I think so. Q. Yes? A. Yes. Q. And do you feel if you were to sit that such opinion or impression would influence your verdict in this case? A. No.

Q. Then, on the other hand, do you feel that if you were to be selected as a juror that you could sit and hear the case and render an impartial verdict? A. I think I could.

Q. Now in fairness to both sides you have no mental reservations about that? A. No." (E-6, 7)

Oliver

"Q. Well now as a result of what you read or discussed, did you form any opinion or impression as to the guilt or innocence of the defendant? A. Yes, I did.

Q. Do you still have that opinion. A. Yes, I do.

Q. You do? A. Yes, sir.

Q. Do you believe that that opinion would influence your verdict if you were selected for this jury? A. I don't think so, it's just something that was in the paper. It doesn't make it so.

Q. Well, do you feel that if you were selected for the jury that you could eradicate any opinion from your mind and join in delivering a fair and impartial verdict? A. I could.

Q. You are sure of that now? A. Yes, sir.

Q. Because I need not tell you how important it is to the defendant that you do assure us of that at this time, that you can give a fair and impartial verdict, right? A. Everybody is entitled to a fair trial." (L-3, 4)

Let us analyze more carefully what the laymen who were being questioned during the voir dire thought when they were asked whether they had formed an opinion as to the guilt or innocence of the defendant. We suggest that these laymen would correlate this question with whether or not they believed the respondent committed

the act of killing Mrs. Currier. But the defense never seriously put this question in issue.

The real issue which was ultimately submitted to the jury was whether the respondent was legally responsible for what he had done. Was he sane or insane at the time the act was committed? The voir dire examination does not disclose any preconceived opinions on this question nor does the so-called public opinion survey. Because of this there is no merit to the importance which the majority below gave to these opinions as to guilt.

If a majority of the prospective jurors questioned about reading of the confession could not remember having done so, is it conceivable after a passage of eight months that any juror would have remembered that the prosecutor at one time said to a newspaper reporter that the respondent was sane? We think not. But even if one did, the prosecutor was not a psychiatrist. When this question was submitted to the jury, it was upon the basis of expert opinions by qualified professionals. A jury is bound to give great weight to the testimony of such experts in open court at the trial and little, if any, value to the memory of a newspaper account some eight months before wherein the District Attorney expressed the belief that the accused was sane.

Keeping in mind the issue in this case, it appears beyond question that the panel which was finally selected to decide the facts did meet the test laid down in *Irvin* v. *Dowd*: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court." These jurors had no opinions on the question of the respondent's sanity. Their verdict that he was sane was based upon the testimony of the expert witnesses in open court, the testimony of the defendant himself, and

their honest evaluation of his conduct past and present gained from the lips of the witnesses in court, the transcripts of the respondent's early behavior and the confession.

Still mindful that the main issue before the jury concerned the respondent's sanity, we finally come to the question whether the newspaper publicity contained in the record actually prejudiced the respondent. Also remember that in *Irvin* v. *Dowd*, the sanity of the defendant was not in issue.

To sustain his right to claim prejudice, this respondent must show the "essential unfairness" of the publicity on the question before the jury. A reading of the articles leads one to conclude that the prosecution had more reason to complain than the defense. Much of the newspaper lineage concerned details of respondent's life disclosed by the defense to lend plausibility to the argument that this man was mentally sick. As his counsel said:

> "Without talking about his own crimes, no one would have known he was insane, and he would have had no defense at all." (527)

Other articles by the wife, the mother and defense counsel expressed the opinion that the respondent was mentally disturbed. The comments of the prosecutor concerning the respondent's sanity were insignificant alongside this barrage of publicity from the defense.

The defense made no attempt in this publicity to hide the fact that Bloeth committed the act of killing Mrs. Currier. The details of this criminal act and the others planned and consummated strengthened the argument that respondent was a "mad killer." Release of portions of the confession to the press by the prosecution did no harm under these circumstances. The more people read about

the gruesome aspects of the case, the more meritorious became the defense of insanity.

We now know that the defense of insanity failed. But as Chief Judge Lumbard said in dissent below:

> "Having embarked on a publicity campaign, the defense should not now be heard to complain of a violation of constitutional rights because its strategy failed."

If this decision is to stand as a guide to the judges of the Federal District Courts, we fail to see how an orderly administration of justice can be fostered. All the criteria considered important in the leading precedents are ignored. Passage of time is no longer important, exhaustion of peremptory challenges is no longer important, the voir dire examination of the jurors is no longer important, the relation of the publicity to the issue before the Court is no longer important, the effect of the alleged prejudice on the respondent's defense strategy is no longer important, the extent to which the respondent contributed to the volume of publicity is no longer important. The sole standard is whether in the opinion of a Federal Judge "the publicity was in its nature highly inflammatory, in volume great, and accessibility universal." The impossibility of this standard is obvious. Where and when could we try the notorious criminals and at what expense to the general public? This was just the untenable position which Justice Clark sought to avoid when he wrote the majority opinion in *Irvin* v. *Dowd*.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York.

BERNARD C. SMITH,
District Attorney of Suffolk County, N. Y.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 387—September Term, 1961

(Argued June 15, 1962 to a panel
Submitted to the in banc court December 5, 1962

Decided January 25, 1963)

Docket No. 27584

UNITED STATES OF AMERICA *ex rel.*
FRANCIS HENRY BLOETH,
Relator-Appellant,

v.

WILFRED DENNO, as Warden of Sing Sing State Prison,
Ossining, New York,
Respondent-Appellee.

Before:

LUMBARD, *Chief Judge*,
CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS and MARSHALL, *Circuit Judges.*

Appeal by state prisoner, sentenced to execution by New York courts for first degree murder, from orders of the United States District Court for the Southern District of New York, Cashin, J., denying petition for writ of habeas corpus. Reversed and Remanded.

LEON B. POLSKY, Legal Aid Society, New York City (Anthony F. Marra, New York City, on the brief), *for Relator-Appellant.*

IRVING L. ROLLINS, Asst. Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), and

CHARLES T. MATTHEWS, Asst. District Attorney of Suffolk County, N. Y. (Bernard C. Smith, District Attorney of Suffolk County, on the brief), *for Respondent-Appellee.*

SMITH, *Circuit Judge,* with whom Judges CLARK, WATERMAN, KAUFMAN, HAYS and MARSHALL concur:

Appellant, convicted of murder in the first degree in the County Court for the County of Suffolk, New York, and sentenced on May 18, 1960 to be executed, judgment affirmed by the New York Court of Appeals March 2, 1961, 9 N. Y. 2d 211, remittitur amended 9 N. Y. 2d 823, certiorari denied October 9, 1961, 368 U. S. 868, petitioned in the United States District Court for the Southern District of New York for a writ of habeas corpus. Show cause order was granted, but the petition was withdrawn without prejudice January 9, 1962 in order to move for reargument in the New York Court of Appeals. Reargument was denied February 22, 1962. Applications for stay pending petition for writ of certiorari were denied by Judge Fuld March 7, 1962 and by Mr. Justice Harlan March 19, 1962. Application to the District Court for the Southern District of New York for writ of habeas corpus was denied April 3, 1962. Leave to reargue and to amend the petition were granted and on reargument the petition for writ of habeas corpus was denied May 9, 1962. From the orders of April 3 and May 9 by Cashin, D.J., relator appeals, claiming that he was entitled to a hearing on his claims that his confession was involuntary and procured in violation of his right to

be represented by competent counsel devoted solely to the interests of his client, and upon the ground that upon the state court record it appears that relator was denied a trial by a fair and impartial jury in violation of his rights under the Fourteenth Amendment. The panel which heard the original arguments on the appeal, Chief Judge Lumbard, Judge Marshall and the writer, considered that the importance of the case as a guide for the District Courts in the discharge of their high responsibilities in the habeas corpus jurisdiction and particularly in the application of the principles recently set down in *Irvin* v. *Dowd*, 1961, 366 U. S. 717, to the facts of cases such as this, make it appropriate for in banc consideration. A majority of the full Court finds this case within those principles and directs the writ to issue.

Between July 31, 1959 and August 8, 1959, there occurred three nighttime murders of lone attendants at small business establishments in Suffolk County, New York. In each instance it appeared that robbery was perpetrated and the victim killed in cold blood by .32 caliber pistol shot to prevent identification of the robber. After the third killing, a witness came forward to tell of the sale of a .32 pistol to appellant prior to the third shooting, and apparently also of statements by appellant admitting the earlier two.

Bloeth was picked up and questioned, denying implication in the murders. Holsters identified as sold him with the pistols referred to were found at Bloeth's residence. He was allowed to see counsel, from the firm of one Siben, in whose office Bloeth's sister was employed. After four days of intermittent questioning, and instruction from Siben that he need not make any statement, but advice from Siben and Bloeth's mother and wife that he should tell the truth and cooperate with the police, Bloeth confessed the

Currier murder, for which he was tried, the other two robbery murders, a rape, an assault with a claw-hammer on an elderly woman, and at least one other armed robbery. Bloeth pointed out to the police where he had disposed of the gun used in the Currier murder. The gun was located and its identity later confirmed by ballistic tests. Prior to the confession Siben informed the District Attorney that Bloeth was in his opinion insane and that he would confess. Siben did not remain with Bloeth to hear the confession to the authorities.

The communities in Suffolk County, small towns and cities in transition from semi rural to industrial and suburban residential areas, had been thoroughly alarmed at the murders and the presence of a "mad killer" in their midst. The press gave front page space and scare headlines to the killings, the search for the killer, and the fears of the people. The press received and widely published news of Bloeth's confession from the District Attorney's office, from the police, from Siben, and from Bloeth's wife, of the contemplated defense of insanity from Siben and from the District Attorney of the District Attorney's belief that Bloeth was sane and must get the chair [1] Prior

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1 The inflammatory and prejudicial nature of the newspaper commentary can only be indicated from the following sample of headlines and articles:

"'Mad Killer' Confesses" (Newsday, August 14)

"Bloeth: From Bad Boy to 'Mad Killer'" (Newsday, August 15)

"Bloeth Must Go To Chair: DA" (Newsday, August 18)

"Bloeth is Insane, His Lawyer Claims—Hopes to Save Killer from Chair" (Long Island Press, August 15)

"'If I Get Chair, That's It': Bloeth" (Newsday, August 18)

"'Joker' in Law: Bloeth Could Go Free Again" (Newsday, August 18)

"Mental Hospital 'Rejects' Bloeth: Killer to Get Sanity Test in Jail" (Long Island Press, September 8)

"As it happens with most major criminals, the wife and neighbors of Francis Henry Bloeth pictured him yesterday as a quiet family

to the confession, while Bloeth was being held for questioning, the District Attorney was quoted in the press as stating that the method of the stickup was "characteristic of the sadistic nature of Bloeth". The press reported that Bloeth "flunked" lie detector tests given by the police in New York City. After the confession, records from Woodbourne Prison were released through the press, describing Bloeth as "hostile, sadistic" with a "deep hatred of discipline" and an admitted narcotic user.

One Newsday article carried the headline "'Joker' in law, Bloeth could go free again", with comment on the New York "archaic sanity law" pointing out a claimed possibility of a jury verdict of acquittal on the grounds of temporary insanity—"Result: The defendant would be free—perhaps to kill again." The newspapers, particularly Newsday and other local papers, as well as New York papers and radio and T.V. news programs, gave extensive coverage to these statements. Newsday, a daily, had a circulation of 100,000 while Long Island Daily Press 35,000 in the county with a population of about 600,000.

When the case was assigned for trial, under New York practice motion was made in the Appellate Division for change of venue by Clarke, formerly of Siben's office, who

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1 (Continued)

man. But to police, he is a violent, sadistic ex-con who is a likely suspect in the 'mad killer' murders." (Newsday, August 12)

"Francis Henry Bloeth, who murdered three humans with as little emotion as other persons feel while swatting mosquitos, could walk out of court a free man in the not-too-distant future because of New York's archaic sanity law * * * Result: The defendant would be free—perhaps to kill again * * * Experts admit that the present law leaves loopholes through which dangerous criminals can escape. But they are quick to say that no one has come up with acceptable substitute proposals * * *" (Newsday, August 18)

"As far as I am concerned," said Cohalan, [the District Attorney for Suffolk County] "Bloeth is legally sane and will stand trial for the three murders. He knew what he was doing and that it was wrong to do it." (Long Island Press, August 16)

had taken over the defense. The results of a survey purporting to show widespread knowledge of the case from the publicity, the formation of opinions of guilt and an opinion by a majority of those questioned that a fair trial was impossible in Suffolk County, were submitted to the Court.[2] The Court however, was apparently of the opinion that a fair trial could be had without change of venue and denied the motion.

Of the 16 jurors seated in the case as regular and alternate jurors, only one had not read of the case. Of the 16, eight stated that they had formed no opinion of guilt or innocence, the other eight stated that they had formed an opinion of guilt, but expressed themselves in various terms as being able to change the opinion or to render an

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2 The affidavit of one Boskin, submitted to the Appellate Division, contained the following:

"That he is over the age of 21 and resides at 51 Marvin Lane, Islip, New York.

That between the dates of February 8, 1960, and February 19, 1960, he was employed by the firm of Clarke & Sider for the purpose of taking a public opinion poll in order to ascertain the status of the opinion of the people residing in Suffolk County towards Francis Henry Bloeth, presently under indictment for murder.

A sample of two hundred and ten residents whose answers to the following questions are annexed hereto and made part of this affidavit are set forth:

1—To the question "Have you ever heard of Francis Henry Bloeth who is accused of murdering three people in Suffolk County?", all two hundred and ten indicated that they were familiar with the subject.

2—To the question "Do you think he is guilty?", two hundred and three answered "Yes", one "Not sure", three are of no opinion and three say "Insane".

3—To the question, "Do you know that he has already confessed?", ten said "No" and two hundred answered "Yes".

4—To the question, "Do you think he would receive a fair trial in Suffolk County?", one hundred and thirty-three answered "No", seventy six said "Yes" and one had no opinion."

impartial verdict.[3] Of 80 other jurors drawn, 42 were excused on various grounds without interrogation as to

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3 In brief summary, the testimony on voir dire of the jurors eventually selected was as follows:

#1—Bassarear	Read Newsday (not every day), Time Magazine, Radio—*opinion as to guilt or innocence*, still held. Opinion could be changed (by testimony)—could render an impartial verdict. Maybe a little prejudice on hearing or reading of the crime.
#2—Bellizzi	Read very little—Long Island Press—*Opinion* as to guilt or innocence—towards guilt. Subject to change (by testimony)—victim of burglary—strong resentment.
#3—Obert	Doesn't recall reading about it—away two weeks in August. *No opinions.*
#4—Usher	Subscribe to Newsday—Read headlines—never read the story. *No opinion.* Bookkeeper—works for beer distributor. Victim's brother a customer. Knew Officer Gaiser.
#5—Schuman	Read Daily News, Mirror, Newsday and weekly—*opinion of guilt or innocence. Prejudice against Defendant* until I hear further evidence. I think I can (dismiss from mind such feeling). Believe can render impartial verdict because of evidence alone. *Opinion, not prejudice.*
#6—Uhl	Only headlines—Daily News—*no opinion* or impression.
#7—Larsen	Read some—Newsday subscriber. Away most of August. *No opinion.*
#8—King	Read in Newsday—Subscribes—Television—*No opinion.*
#9—Rockwell	Times, Tribune, World-Telegram—few articles. *No opinion.*
#10—Adams	New York Daily News and Radio—Discussed casually. *Expressed opinion I was thankful* after apprehension of Defendant.
#11—Dowd	Newsday, subscribe. Discussed. *Formed opinion as to guilt or innocence towards Defendant's guilt—still have it.* Would not influence verdict. Read statements or quotations from District Attorney Cohalan.

knowledge of the case from the publicity. Of the remaining 38, 36 had read about the case, 2 had not, 31 stated that they had formed an opinion of guilt or innocence, 5 stated they had formed no opinion. In every case where the talesmen were asked to specify which way the opinion went, it was toward Bloeth's guilt.[4]

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3 (Continued)

#12—Oliver	Herald Tribune—discussed, *opinion as to guilt or innocence towards guilt*—still have it. Don't think it would influence verdict. Could eradicate. Auxiliary policeman.
Alt. #1--Foster	Newsday—subscribes—*formed opinion of guilt.* Could set it aside.
Alt. #2—Parizman	Newsday and other publications—Discussed. *No opinion.*
Alt. #3—Lomonosoff Took place of juror #11.	Read about it—of course I did—Newsday—subscribes. Discussed. *No opinion.*
Alt. #4—Stopes	Read of it of course—probably Newsday and one of New York papers. Discussed with wife. *Opinion*—Don't now have "firm opinion". Don't believe it would influence verdict.

4 Summary of examination of Prospective Jurors not seated:

Wisnoski	Had done business with District Attorney and Asst. District Attorney. Excused by consent.
Ueckerman	Read of case in local daily papers—held an opinion which would influence verdict—challenged by Defendant for cause.
Lynch	Read of case in daily paper, Newsday—heard of it on radio—no opinion. Represented by Siben in negligence case—Peremptory by People.
Kemp	Read of case in Newsday and Herald Tribune—radio—T.V.—Opinion. Evidence would have to be pretty strong to change it—could render impartial verdict. Siben represented juror's wife in negligence case, opinion, not prejudice. Peremptory by Defendant.
Martens	Followed the case closely in Newsday—Probably radio, T.V. Formed opinion—still have it. Think could render an impartial verdict. Opinion would influence verdict. Challenged for cause by Defendant.

The trial commenced April 19, 1960. Five trial days were consumed in obtaining a jury, ten in presenting evi-

4 (Continued)	
Kiernan	Newsday, Herald Tribune, Journal-American, T.V. Formed opinion of guilt, still held, could change, could bring in impartial verdict. Peremptory by Defendant.
McHugh	Newsday, World Telegram, radio, T.V.—Formed opinion, still have it. Could render impartial verdict—Victim of armed hold-up. Peremptory by Defendant.
Lee	Newsday, radio, T.V. Opinion still held. Could change, fair to both sides. Summer policeman—traffic. Peremptory by Defendant.
Hops	Newsday, radio, opinion still held, claustrophobia—excused by consent.
Brown	Newsday, Long Islander, Telegram, News, radio, T.V. Opinion still held—Think can render impartial verdict. Victim of two armed robberies. Challenged by Defendant for cause (bias).
Knoop	Tribune, Long Island Press, radio—Opinion, still held. Would not influence verdict. Peremptory by Defendant.
Becker	Know District Attorney, Friend of sheriff—Auxiliary policeman—Excused by consent.
Woodhull	Daily News, County Review, probably Newsday. Opinion still held, don't think it would influence verdict. Peremptory by Defendant.
Fennell	Journal-American. Opinion of guilt still held—Doesn't think it would influence verdict. Peremptory by Defendant.
Almasy	Long Island Press, radio, T.V., opinion still held. Could dismiss and render impartial verdict. Peremptory by Defendant.
Van Emmerick	Know District Attorney. Excused by consent.
Palmer	Newsday, possibly T.V. Opinion of guilt still held, would not affect verdict. Peremptory by Defendant.
Price	Newsday. Peremptory by Defendant.
Dewall	Peremptory by People.
Ten Eyck	Newsday, Daily News. Opinion, still held. Doesn't think it would influence verdict. Peremptory by Defendant.

dence. The confession was admitted in evidence. Psychiatrists testified for both sides on a defense of insanity.

4 (Continued)	
Meyer	Newsday, T.V. Opinion still held. Afraid it would influence verdict. Excused by consent.
Shay	Excused by consent.
Downing	Excused by consent.
Miller	Newsday, Daily News. Opinion still held, doesn't think it would affect verdict. Hardship. Excused by consent.
Oppenheimer	Daily News, radio. No opinion. Peremptory by People.
Gould	Attendant at mental hospital. Peremptory by People.
Webber	Herald Tribune—Opinion still held—Doesn't think it would influence verdict. Peremptory by Defendant.
Mrs. Cowan	Excused by consent.
Balsanek	Newsday—Opinion still held, doesn't think it would influence verdict. Peremptory by Defendant.
Jekle	Newsday, News, Sunday Times. Opinion still held. Could render impartial verdict. Read of the purported confession. Peremptory by Defendant.
Siegel	Wife employed by Siben. Excused by consent.
Allen	Hardship. Excused by consent.
Frank	Excused by consent.
Virag	Hardship. Excused by consent.
Mrs. Foster	Excused by consent.
Hendrickson	Newsday, Daily News. Opinion still held. Doesn't believe it would affect verdict. Peremptory by Defendant.
Seaburg	Radio, Daily News, Bridgehampton News. Opinion, still held, could not render impartial verdict. For cause by Defendant.
Toms	Hardship. Excused by consent.
Glaessgen	Radio, Newsday, Long Island Press and New York papers. Health—Excused by consent.
Mrs. Griffin	Excused by consent.
Towle	Hardship. Excused by consent.
Farkas	Excused by consent.

Bloeth himself took the stand, to tell of the history of his behavior, his crimes and incarcerations from an early age.

4 (Continued)	
Knaggs	Away, read no papers. Peremptory by People.
Ast	All papers, New York and local—Long Island Press, Newsday, Islip Press, Bay Shore Sentinel. Opinion still held would influence verdict. For cause by Defendant.
Wisniewski	Excused by consent.
Wilson	Excused by consent.
Barry	Excused by consent.
Werner	Daily News, Herald Tribune, Port Jefferson Times (?). Peremptory for Defendant.
Mubray	Hardship. Excused by consent.
Campeau	Long Island Press—headlines—no opinion—Peremptory by Defendant.
Felton	Client of Siben. Excused by consent.
Albers	Daily News, Long Island Press, radio, opinion still held. Doesn't believe it would influence verdict. Knew victim. Peremptory by Defendant.
Orenda	New York Daily News, Newsday. No opinion. Peremptory by Defendant.
Biase	Newsday—opinion—Doesn't think it would affect verdict. Peremptory by Defendant.
Slatniski	Excused by consent.
Anderson	Hardship. Excused by consent.
Holmes	World Telegram & Sun, News Review. Opinion still held. Doesn't believe it would affect verdict. Victim of hold up. Peremptory by Defendant.
Smith	Client of Clarke. Excused by consent.
Raynor	Hardship. Excused by consent.
Fuoco	Employed Veterans Admin. Hospital. Mental cases. Peremptory by People.
Davita	Newsday—No opinion. Peremptory by People.
Miller	Two sons policemen. Excused by consent.
Wesp	Conscientious objector to capital punishment. For cause by People.
Duffield	Read reports—unable to give fair break to Defendant. Excused by consent.

He denied any memory of the Currier murder or of making the confession; or of the occasion of assaulting a woman with a hammer. The jury after a total of some 13 hours deliberation, brought in a verdict of guilty on the first count, murder in the first degree, calling for a mandatory death sentence, not guilty on the second count of felony murder, and guilty on the third count of robbery.

Petitioner exhausted his state remedies, including petition for certiorari to the Supreme Court of the United States, and the case is properly before us on the appeal from the two orders of the District Court denying the writ of habeas corpus.

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4 (Continued)

Bergstrom	Read about case. Peremptory by Defendant.
Lehtonen	Excused by consent.
Appel	Hardship. Excused by consent.
Gagen	Peremptory by Defendant. (1 remaining for Defendant, 2 for People)
Clements	Knows witnesses and Defendant. Excused by consent.
Conklin	Hardship. Excused by consent.
Meyer, L.	Auxiliary police. Excused by consent.
Bernstein	Friend of Sider, Clarke, Siben and one of victims. Excused by consent.
Fagan	Client of Siben. Peremptory by Defendant.
Mrs. Seyford	Excused by court.
Peterson	Acquaintance and hardship. Excused by consent.
Koenig	Hardship. Excused by consent.
Memejer	Hardship. Excused by consent.
Griffin	Didn't read about case. Scruples against death penalty. For cause by People.
Furey	Long Island Press, Daily News. Opinion, still held. Unable to render impartial verdict. For cause by Defendant.
Murphy	Neighbor of District Attorney. Excused by consent.

The final test in a case such as this is whether the federal judiciary, which is the final arbiter with respect to any alleged deprivation of constitutional rights involving mixed questions of law and fact, *Brown* v. *Allen*, 1953, 344 U. S. 443, 507 (opinion of Frankfurter, J.), is satisfied that the jurors were in fact capable of, and did, lay aside their preconceived judgment, and render a verdict solely on the evidence presented in court. Since the District Court in the case at bar acted solely on a review of the available record, its findings are not based in any degree on demeanor evidence. *Cf. Orvis* v. *Higgins*, 2 Cir. 1950, 180 F. 2d 537, cert. denied, 1950, 340 U. S. 810. If these findings are clearly erroneous, that is, if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 1948, 333 U. S. 364, 395, we must reverse.

We have examined the record, including the voir dire examination of the jurors challenged or excused, which was not before Judge Cashin. His conclusion that lack of impartiality of the trial jury had not been established appears to us clearly erroneous. Jury impartiality must be measured by the standards established by the Supreme Court in the line of cases culminating in *Irvin* v. *Dowd*, 1961, 366 U. S. 717. There the court traced the history of the development of the rule in the face of the wide growth of crime coverage by expanding news media, pointing out the right to a fair trial by a panel of impartial, "indifferent" jurors, the growing difficulty of obtaining a panel who had never heard of a well known case, the acceptability of a juror who had some preconceived notion of guilt or innocence, provided the juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court. Applying these rules to the facts of that case, however, it was made plain that merely going through the

form of obtaining jurors' assurances of impartiality is insufficient. The reviewing court must determine, from a review of the entire voir dire, whether the extent and nature of the publicity has caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial.

These standards are not met in the case at bar. The publicity was in its nature highly inflammatory, in volume great, and accessibility universal. It reached and entered the consciousness of the overwhelming majority of available talesmen. It is true that defense counsel shared with the state responsibility for much of the publicity which made the selection of an impartial jury difficult. As against this, however, there remain the considerations that much of the prejudicial matter, particularly that from the files of a state institution, and in part the attack on the insanity defense, came from the prosecution. Counsel in the jury selection failed to exhaust his challenges on the original twelve chosen (although he did exhaust them on the choice of one of the alternates, who participated in the deliberations and verdict of the jury) and counsel stated that each juror finally chosen was acceptable to the defense. But the ultimate responsibility lies with the state: It successfully opposed the change of venue requested by substituted counsel to obviate the effects of prejudicial publicity to which the District Attorney had heavily contributed. This disavowal of the tactics of Bloeth's original counsel cannot be ignored. It is true that there was drawn from jurors, even those who stated that it would take evidence to alter their opinions of guilt, the statement that they felt they could act impartially. This, however, placed on those individuals a burden we think impossible to be borne, in the light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the

opinions had been held and their persistence. "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin* v. *Dowd, supra* at 727. Compare *Beck* v. *Washington*, 1962, 369 U. S. 541. In the *Beck* case, all those who admitted bias or preformed opinion as to guilt or that they might be biased or might have formed an opinion were excused. *Id.* at 556. Here there were so few that had not formed an opinion that the inquiry was mainly whether the juror could "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd, supra* at 723. The difficulty in this situation has been described by the First Circuit in *Delaney* v. *United States*, 1st Cir. 1952, 199 F. 2d 107, 112-113, "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." We think it quite impossible that the jury here chosen succeeded in doing so.

It may be argued that since the trial strategy adopted by Siben and perforce followed by his successor Clarke called for emphasis on the number and brutality of Booth's crimes as a basis for the defense of insanity, no harm was done in choosing a jury already familiar with his otherwise inadmissible history. There are at least two insurmountable difficulties with this argument. The publicity, partly sponsored by the prosecution, created opinions of guilt long before trial, far removed from any safeguards against inadmissible matter, and included inadmissible material emanating from the prosecution denigrating the insanity defense and so predisposing the prospective jurors to reject it. A defendant is entitled to be tried on the evidence

and arguments before the jury in open court, under the guidance of a judge.

The opinions formed in this case, moreover, were based not solely on accounts of the crime at issue, but on accounts of admissions of many other crimes not on trial, and on accounts containing expressions of the disbelief of the District Attorney in the lack of sanity of the defendant, with editorial attack upon the possibility of a legal loophole that by the defense of insanity would free the mad killer to strike again. The interest of the public in the knowledge of the apprehension of the one terrorizing the countryside exists, but cannot justify the denial of an impartial jury to the one accused. The record is convincing that such an impartial jury could not be obtained in Suffolk County at the time this jury was drawn for the trial of this case. While time elapsing between the original publicity and the trial might in many cases blunt the effect of publicity and obviate the need for change of venue, it did not in this case, in view of the saturation nature of the publicity in the non-metropolitan area covered. The record of the voir dire amply demonstrates that despite the interval, the effect of the publicity was little diminished at the time of trial. There is, moreover, no demonstrable difficulty in such a case as this, in providing against probable prejudice. Either a metropolitan county or a rural county at some distance, without the intense local interest and intense local press coverage would undoubtedly provide a much higher percentage of talesmen uncontaminated by improper publicity. No harm would have been done the People, either at the time of the trial or now in bringing Bloeth to trial before a jury assuredly unprejudiced by long held opinions of guilt.

The other principal ground for attack on the judgment below, failure of the District Judge to grant a hearing on the claimed issue of incompetent or disloyal representation by Siben, appears to us not well taken. Attempted infer-

ences drawn from purported remarks made by Siben, reported in the press, that he acted from concern for Bloeth's family and the public in urging the confession, and the inference that he acted to curry favor with the District Attorney because then under indictment himself for the misdemeanor of solicitation of business are backed by no affidavit or offer of proof. The defense had an opportunity to explore these points when Siben and the defendant were on the stand in the state court trial. They developed nothing then or later to raise the claims above mere conjecture, and pointed to nothing new before Judge Cashin. Judge Cashin was not required to grant a hearing at this time on that claimed issue. Hindsight, of course, tells us that the advice to confess ill served the defendant, and it is indeed difficult to understand why, even if past conduct was to be relied on to support a defense of insanity, it should not have been brought out by proof in court rather than in announcements to the press and confession, unattended by counsel, on questioning by expert police interrogators. Poor tactics of experienced counsel, however, even with disastrous result, may hardly be considered lack of due process, in contrast to failure of provision of an unbiased trier, which assuredly is a lack of due process.

Because on the record we hold that the jury drawn in this case did not meet the standards of impartiality required by the Fourteenth Amendment, we reverse the orders of the District Court appealed from, and remand for the issuance of a writ of habeas corpus, which should however be conditioned to permit retention in custody for the purpose of retrial on the indictment before a proper jury. In view of the time which has now elapsed we do not make it a condition that a change of venue be granted, provided that wherever the trial be held the jury meet the standards of impartiality outlined herein.

LUMBARD, *Chief Judge*, with whom Judges MOORE and FRIENDLY join—dissenting:

In my judgment the petitioner's trial and conviction before a Suffolk County jury did not violate his constitutional rights. I would affirm Judge Cashin's denial of the petition for writ of habeas corpus.

The pretrial publicity of criminal cases which emanates from police, prosecution, or defense sources is highly undesirable. But it is not the law that such publicity in and of itself constitutes a denial of due process of law. There is a "constitutional infirmity" only if the petitioner was not tried by an impartial jury. *Beck* v. *Washington*, 369 U. S. 541, 556 (1962). The *Beck* case also makes plain that a federal reviewing court should not overturn a state court conviction on the grounds asserted here unless the jurors' inability to render an impartial verdict is so clear as to pass beyond the realm of disputable fact and to become "a matter of law." *Id.* at 557. As the Supreme Court said in *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 281 (1942), and reaffirmed in later cases, *Beck, supra*, at 558; *United States ex rel. Darcy* v. *Handy*, 351 U. S. 454, 462 (1956), one who seeks to have a federal court set aside a state criminal conviction has "the burden of showing essential unfairness * * * not as a matter of speculation but as a demonstrable reality."

As I read the record in this case, the petitioner has failed to sustain this burden in two respects. First, in view of the passage of time between the publicity and the trial, the responses of the talesmen at the *voir dire* examination, and the nature of the publicity and the defense offered at trial, I believe that the petitioner has failed to demonstrate that the jury was prejudiced. Second, even if it could be said as a matter of law that the jury was prejudiced to some degree, this was the product primarily

of acts of the petitioner's lawyer, who, moreover, had the willing cooperation of the petitioner and his family. Any acts of the prosecution which might otherwise have been prejudicial were, in effect, adopted and used by the defense for its own purposes; they may not now be complained of as a deprivation of constitutional rights.

The Evidence of Prejudice

There is no question that the three murders which occurred in Suffolk County between July 31, 1959, and August 8, 1959, had become a major, if not the primary, news item in local newspapers when the petitioner was picked up for questioning on August 10. Both of the local papers, Newsday and the Long Island Daily Press,[1] extensively covered the investigation of the petitioner's possible connection with the murders, coverage which culminated on August 14 with an article in Newsday under the banner headline, "'Mad Killer' Confesses" and an article in the Press under the headline, "How Bloeth Murdered 3." Thereafter, as might be expected, the newspapers turned their attention from the killings themselves to the man who had confessed to having committed them. They published extensive reports of the work of the police and prosecution leading up to the petitioner's indictment for murder on August 31, and gave accounts of every available detail of his life.

So far as the record indicates, this publicity was concentrated into a period of about five days. After August 19, except for a few short articles, the newspapers apparently turned their attention, and the attention of their readers,

1 Newsday had a circulation of about 100,000 and the Long Island Daily Press a circulation of about 35,000. The population of Suffolk County in the 1960 census was about 665,000.

elsewhere. On August 31 and the day following, the indictment momentarily refocused attention on the petitioner. The only article after September 1 which is included in the record is a short article in the Press on October 7, which reported that the petitioner had obtained a new attorney.

Without detailing the nature of the publicity, some of which will be considered more fully hereafter, it can be said that the articles appearing between August 10 and August 19, and particularly those appearing in the last five days of that period, painted a lurid picture of the petitioner as a multiple murderer who was at best violent and vicious, and who was possibly dangerously insane. Given the local terror engendered by three related murders in a period of nine days and the highly concentrated sensational publicity of the petitioner's connection with them, it is probable that around August 20, most of the potential jurors in Suffolk had a belief that the petitioner had committed the murders, and that whatever ability they might otherwise have had to consider evidence impartially was affected by the recollection of terror and, perhaps, fear that any verdict other than guilty would mean a renewal of terror. Undoubtedly this state of affairs continued for some time.

But it was not until April 18, 1960,[2] eight months after virtually all of the dangerous publicity had ceased that the selection of a jury began. By that time, terror of the preceding August must have abated and the recollection of the newspaper accounts been blunted to some degree, although as the *voir dire* examination and the February public opinion poll indicate, not erased.[3] For this reason, whatever would have been the situation had the trial been conducted in August 1959 or had the publicity continued

2 The actual examination of prospective jurors began on April 19. Preliminary matters were completed on April 18.

3 The content of the poll and its results are stated in footnote 2 of Judge Smith's opinion.

up to April 1960, in the situation as it existed on April 18, the prior publicity does not without more establish that the petitioner's trial was unfair. *Compare Irvin* v. *Dowd*, 366 U. S. 717, 726-27 (1961), in which the Supreme Court noted that prejudicial newspaper publicity continued up to and during the selection of the jury, *with Beck, supra*, at 556, in which the Court noted that the adverse publicity of which the petitioner complained had given way in large measure to other more "newsworthy" items prior to the beginning of his trial.[3a]

As I understand the majority's opinion, the writ is granted here because the majority does infer directly from the fact of publicity to the fact of prejudice. The February public opinion poll indicates that the public did recollect that the petitioner was connected with the murders for which he was tried, that it had an impression of his guilt based, perhaps, on its recollection that he had confessed, and that a substantial portion of the public thought in February that the petitioner could not obtain a fair trial in Suffolk County.[4] Without making much of the fact that this poll preceded the trial by two months, suffice it that the state courts are not held to the "impossible standard" of a jury all the members of which have no "preconceived notion as to the guilt or innocence of an accused." *Irvin, supra*, at 723. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* Half of the sixteen talesmen selected in this case as regular or alternate jurors

3a Among the events which occupied the news during the eight months in question here were the launching by the Soviet Union of a space rocket which hit the moon, Khrushchev's thirteen-day visit to the United States, the congressional inquiry into the fixing of television quiz programs, and the start of the political campaigns of presidential aspirants.

4 It is significant, for reasons stated below, that the poll did not include any question pertaining to whether or not the people polled believed the petitioner to be insane.

stated that they had formed no opinion of guilt or innocence. Of the other eight, each of them stated that he believed he could render an impartial verdict. Since the results of a private poll taken two months before the trial surely are not as reliable as the answers actually given by the jurors at the *voir dire* examination, I must conclude that the majority refuses to accept the jurors' estimate of themselves because in its judgment that estimate could not in the nature of things be correct. Such a determination is permitted. *Irvin, supra*, at 727-28. But I believe it to be warranted only in truly exceptional circumstances. A comparison of this case with *Irvin* shows the absence of exceptional circumstances here. Apart from the difference in the timing of publicity and trial, this case differs significantly from *Irvin*. Since in that case the defense exhausted its peremptory challenges, the presence on the jury of one juror who stated that he "could not * * * give the defendant the benefit of the doubt that he is innocent," and another who said that he had a "'somewhat' certain fixed opinion" of the defendant's guilt, *id.* at 728, suggests that the defense had done its best but that prejudice had not been entirely eliminated. There were no comparable statements by jurors in this case, and when the selection of the regular jurors was completed, the defense had still the right to excuse without cause any juror who was objectionable.

One other fact is significant. It is abundantly clear from the transcript of the examination of prospective jurors that both the prosecution and the defense anticipated that the question of insanity would be the only one seriously disputed at the trial. The record of the trial shows that this turned out to be the fact. In his opening, the petitioner's counsel made no response to the prosecution's detailed narrative of the commission of the crime charged except to say that the prosecution must prove its case

beyond a reasonable doubt. He devoted almost all of his remarks to setting out facts suggesting that the petitioner was insane, and plainly indicated that no other defense would be attempted. Apart from a limited amount of cross-examination of the prosecution's witnesses, the defense devoted its entire effort to establishing the petitioner's insanity. The only witnesses called by the defense were petitioner's mother, who testified concerning her son's history, Dr. James E. Rappa, a neuropsychiatrist, and petitioner himself. Again in the summation, the defense attorney gave virtually no attention to the question whether the petitioner had committed the crime. Except for some attempt to minimize the effect of the confession, he concentrated exclusively on the question of insanity. After the jury had retired, they asked for and received the voluminous records of petitioner's mental history.[5]

Since it is only "essential unfairness" which merits reversal of a state court conviction, we should not ignore

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5 The extent to which the defense conceded every part of the state's case except Bloeth's sanity is indicated by the following exchange between Bloeth and counsel for the defense on redirect examination:

"Q. Now with reference to these answers that you gave Mr. Cohalan in the confession, you said that you had nightmares about this, is that right? A. Yes.

Q. And did these nightmares take place after the morning of August the 8th? A. I don't know. I don't know exactly when they did. I had quite a few. I have always had nightmares of some kind.

Q. Did you ever have nightmares about this incident or about a woman dying. A. Well, I've had them about quite a few people dying, being killed and stuff. I don't—you see, I don't, I don't know exactly when I have them. Just sometimes I remember them, sometimes I don't, I don't know. I—I—

Q. When you say you don't know, you are not saying, you are not denying you did this, you are not saying you were somewhere else, are you? A. No, I just don't remember anything, where I was or anything. I mean I heard people say I was, some people say I was here and some people say I was there. I don't know where I was.

Q. So, so far as you know, that confession could be perfectly true, is that correct? A. Yes, it could be."

Record on Appeal to the New York Court of Appeals, p. 1006.

the fact that only the issue of insanity was ever in dispute. The defense having all but conceded every other facet of the case, it is unrealistic to say that the petitioner was prejudiced by the jurors' pre-existing opinion concerning the commission of the crime unless this opinion affected their deliberations concerning insanity.[6] There is nothing to show that this was the case. None of the prospective jurors was asked his opinion as to petitioner's sanity or even whether he had an opinion on the subject. On the other hand, every juror finally selected, and every prospective juror who was not theretofore excused or challenged on some other ground, was examined at length about his understanding of insanity as a legal defense. Both counsel referred repeatedly to the language of New York Penal Law § 1120, which defines the defense of insanity. It was emphasized that the state had the burden of proof on this issue. So far as can be gathered from the transcript, only one person was challenged by the defense because of his views on insanity,[7] and none by the prosecution. The

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6 Contrast *Irvin* v. *Dowd*, *supra*. In that case, in which two-thirds of the jurors had expressed an opinion of guilt, id. at 728, that opinion bore directly on the issues at trial. No question was raised at the trial about Irvin's legal responsibility for the crimes charged if he had in fact committed them, nor did anyone anticipate that this issue would be raised. In the entire voir dire examination, covering almost 3000 pages of the transcript, there is no mention by either side of the issue of insanity. Transcript on file with the clerk of the Supreme Court of Indiana.

7 Adolph Almasy, who responded affirmatively to the following questions by the defense:

"Actually do you feel a person to be legally insane would have to have some outstanding physical characteristics per se?"

"In other words, you feel for somebody to be legally insane they would have to be unable to function, they couldn't, say serve as a brother officer in the army or hold down a job or something of that nature?"

"You would feel he would have to show outward manifestations of an inability to function or operate?"

Transcript of examination of prospective jurors, p. CC 29.

prosecution peremptorily challenged without further questions one person who worked in a mental hospital.[8]

We have no way of knowing whether the eight jurors who said that they had a formed opinion of the petitioner's "guilt" meant by this that they believed him to be sane. But it is at least true that we should not read into words used by laymen the expertise of a lawyer. And so far as an inference can be drawn from the publicity on which these opinions were based, the suggestion is that these jurors had not prematurely resolved the question of insanity against the petitioner. The vast bulk of the publicity was a recounting of details which would lead most people to have doubts about the petitioner's sanity. (In any event, of course, these jurors, like the others, stated at the *voir dire* examination that they could consider the evidence at trial and decide on that basis alone.)

I do not condone the pretrial publicity which the prosecution or the defense gave to this case. But our sole function is to ensure that the petitioner has not been deprived of his constitutional rights. In my judgment, the petitioner has not shown "as a demonstrable reality" that he was not tried by an impartial jury.

The Conduct of the Defense

Even were I to accept the conclusion of my brothers that the publicity given this case by the prosecution would, if standing alone, require reversal, the fact is that far from being prejudiced by it, the defense welcomed and added to it. It was the strategy of the defense almost from the day on which the petitioner was arrested to broadcast as widely as possible every fact and argument which would support

8 Joseph J. Fuoco. Transcript of examination of prospective jurors, p. DD 154-55.

the theory that petitioner was insane and not legally responsible under New York law. Nor was this a situation where the defense was forced to publicize its cause in order to mitigate the prejudice created by the prosecution. From the outset, the defense took the lead in providing the newspapers with information. Having embarked on a publicity campaign, the defense should not now be heard to complain of a violation of constitutional rights because its strategy failed.

It is true that the district attorney expressed to reporters his opinion that the petitioner was sane. But this voice from the other side was drowned in the uproar created by the petitioner's counsel, his family, and by the petitioner himself. Over and over again they were quoted as saying that the petitioner was "mentally deranged" or "sick," or "insane." His mother told reporters about his childhood and said that she had "known for a long time that he's been a Jekyll-Hyde character."[9] She informed them that he had always been in trouble and that when he was young she had "signed the paper to have him sent to Kings County Hospital for observation, but they just said he was mentally disturbed and they wouldn't put him away."[10] The petitioner's wife told reporters that he had admitted to her that he had broken the back of a dog when he was twelve;[11] that "from the things he said to me about death * * * the way he talked about it so much * * * his constant fights and then the trouble with the police again and again * * * I knew he was mentally sick";[12] that she tried to persuade him to go to a hospital and undergo hypnosis to find out "what's really wrong" with him.[13] She quoted him as saying:

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9 Newsday, August 15, 1959.
10 Id.
11 Id.
12 Long Island Daily Press, August 14, 1959.
13 Id.

> "Jane—you mustn't feel bad about all this. It's not your fault. You've been a wonderful wife to me, but all my life things have been this way. It's sort of free will. It was bound to happen. I knew I had to rob and kill those people. They were meant to die. It was their time. I was just the instrument. If I get the chair, then that's how it has to be. I always knew somethink [sic] like this would happen. It's my destiny." [14]

His counsel repeatedly expressed his opinion that the petitioner was insane, sometimes taking care to phrase his opinion in terms suggestive of the New York insanity statute.[15] He kept reporters informed of the steps being taken to establish the defense of insanity.[16] He described the petitioner in terms calculated to engender the horror of the dangerously insane. The following statements are typical:

> "He doesn't know right from wrong. He enjoyed the killings. He shows absolutely no feeling of remorse about them.
>
> "He is the most cold-blooded murderer I have met in my 25 years of dealing with criminals as a lawyer." [17]
>
> "[He is] * * * as mad as a hatter and I intend to prove it with the help of a psychiatrist who is in-

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14 Newsday, August 18, 1959.

15 Newsday, August 14, 1959; Newsday, August 15, 1959; Newsday, August 18, 1959; Long Island Daily Press, August 15, 1959; Long Island Daily Press, August 16, 1959.

16 Newsday, August 15, 1959; Newsday, August 17, 1959; Newsday, August 18, 1959; Newsday, August 20, 1959; Long Island Daily Press, August 15, 1959; Long Island Daily Press, August 16, 1959; Long Island Daily Press, August 17, 1959; Long Island Daily Press, August 18, 1959.

17 Long Island Daily Press, August 15, 1959.

vestigating Bloeth's background. No man could gleefully boast about such terrible crimes without being insane." [18]

He told reporters that he believed the petitioner had committed other crimes,[19] and then informed them that the petitioner had confessed to him other crimes including burglary, larceny, safecracking, robbery and assault.[20] The petitioner had no reluctance to speak to the press. One article quoted him as saying to reporters, "I'd have been a terror if I'd been with Castro," and to newsreel cameramen, "Don't forget to put me in for an Academy Award. I'm giving you guys a real show today." [21]

An examination of the publicity of which the defense now complains shows clearly that most of it emanated from the defense itself. Without the willing cooperation of the people surrounding the petitioner and the petitioner himself, the newspapers would have been able to say much less than they did. The motion for change of venue was made on February 19, 1960, more than five months after tl defense-inspired publicity had died down. I do not understand why the defense, having adopted its strategy and pursued it with full vigor, should be permitted to avoid the effects of its own acts when the strategy has failed.

It does not necessarily follow from the fact that some publicity adverse to the defendant came from state sources that the whole process of criminal prosecution and trial was thereby tainted. As stated above, our function is solely to protect the rights of the accused. When, as here, a

18 Newsday, August 18, 1959.

19 Newsday, August 17, 1959; Long Island Daily Press, August 17, 1959.

20 Long Island Daily Press, August 18, 1959.

21 Newsday, August 15, 1959.

defendant who is aided by counsel follows a course which renders without significance what the state had done, there is not that fundamental unfairness which requires federal action. See *United States ex rel. Reid* v. *Richmond*, 295 F. 2d 83, 87-90 (2 Cir.), cert. denied, 368 U. S. 948 (1961). In such a case there is no prejudice, and our interference is neither required nor justified.

I agree with my brothers that the other claims of error below are without merit.

I would affirm the order of the district court which denied the writ.